

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 7, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP1443-FT

Cir. Ct. No. 2005CV148

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

MICHAEL J. WEIGAND,

PLAINTIFF-APPELLANT,

V.

ALAN GREFSHEIM AND LINDA GREFSHEIM,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Rusk County:
FREDERICK A. HENDERSON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Michael Weigand appeals a summary judgment granted to Alan and Linda Grefsheim.¹ He argues the court erred: (1) by granting

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

summary judgment, because material issues of fact exist; and (2) by denying without a hearing his motion to enlarge the time to respond to the summary judgment motion.² We disagree and affirm the judgment.

BACKGROUND

¶2 Weigand and the Grefsheims own adjoining parcels of land on Island Lake in Rusk County. On December 9, 2005, Weigand filed suit against the Grefsheims. His complaint alleged a claim he now asserts is an adverse possession claim.³

¶3 The Grefsheims moved for summary judgment on March 20, 2006. A hearing on the motion was set for April 17. On April 12, Weigand filed a motion to enlarge time to respond to the summary judgment motion. On April 17, the day of the hearing, Weigand filed an affidavit opposing summary judgment. The court denied Weigand's motion to enlarge time to respond and thus did not consider Weigand's affidavit opposing summary judgment.⁴

¶4 The court heard argument on April 17 as scheduled and granted the Grefsheims summary judgment in a written decision dated April 27. In its written

² In his brief to this court, Weigand relies on an unpublished opinion in violation of WIS. STAT. RULE 809.23(3). See *John Deere Co. v. Krueger*, No. 86-1590, unpublished slip op. (Wis. Ct. App. Feb. 24, 1987). Violation of the rules of appellate procedure is grounds for dismissal of the appeal. WIS. STAT. RULE 809.83(2).

³ Weigand also filed a lis pendens. However, the lis pendens was erroneously filed against his own land rather than the Grefsheims' property.

⁴ It is not clear from the record when the motion to enlarge time was denied. At the April 17 hearing, counsel for the Grefsheims noted in his opening remarks that the motion had already been denied, and the court's written decision granting summary judgment appears to assume the motion was denied. However, the court never explicitly denied the motion on the record.

decision, the court found that no opposing affidavits were filed within the time required by WIS. STAT. § 802.08(2) and that Weigand “had the duty to submit evidence opposing defendants’ facts, but did not do so.” In addition, the court held “the complaint contains no discernable claim for adverse possession, and makes no sense to the Court.” The court therefore granted summary judgment.

STANDARD OF REVIEW

¶5 Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. WIS. STAT. § 802.08(2). We review a grant of summary judgment without deference, using the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶6 This appeal also involves a challenge to the court’s denial of a motion to extend the time for filing a response to a motion for summary judgment. Whether to extend the time for filing is a discretionary decision, and we review it for erroneous exercise of discretion. *Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 467, 326 N.W.2d 727 (1982).

DISCUSSION

¶7 Weigand first argues that even if the court properly denied his motion to extend the time for his response, summary judgment is inappropriate because the Grefsheims’ affidavits fail to show that they are entitled to judgment as a matter of law.

¶8 Our summary judgment methodology is as follows:

[We first review] the complaint to determine whether, on its face, it states a claim for relief. If it does, we examine

the answer to see if issues of fact or law have been joined. After we have concluded that the complaint and answer are sufficient to join issue, we examine the moving party's affidavits to determine whether they establish a prima facie case for summary judgment. When they do so, we review the opposing party's affidavits to determine whether there are any material facts in dispute, or inferences from undisputed material facts, that would entitle the opposing party to a trial.

Butler v. Advanced Drainage Sys., Inc., 2006 WI 102, ¶18, 717 N.W.2d 760 (citations omitted).

¶9 Weigand's complaint does not assert any recognizable claim for adverse possession. An adverse possession claim exists when a party possesses land in a "hostile, open and notorious, exclusive and continuous" manner for a twenty-year period. *Leciejewski v. Sedlak*, 116 Wis. 2d 629, 636, 342 N.W.2d 734 (1984); *see also* WIS. STAT. § 893.25. In order to state a claim, a complaint must give the other party "fair notice" of what the claim is and the grounds upon which it rests. *See Hertlein v. Huchthausen*, 133 Wis. 2d 67, 72, 393 N.W.2d 299 (Ct. App. 1986).

¶10 Weigand asserts the following statement from his complaint alleges a claim for adverse possession: "[A]t all times pertinent hereto, and until approximately 1969 ... [t]he property line [between the two parcels] was accepted as the right of way of Old County Highway 'D,' which was relocated in approximately 1969." This statement does not put the Grefsheims on notice that Weigand's claim was for adverse possession. The statement appears to allege a mutual boundary agreement. It makes no reference to adverse possession, and alleges no facts—no use of the land, no particular type of use, and no twenty-year time period—that would give the Grefsheims any indication Weigand's claim was an adverse possession claim.

¶11 Even if Weigand had stated a claim in his complaint, summary judgment would be appropriate. In some situations, “a party moving for summary judgment can only demonstrate that there are no facts of record that support an element on which the opposing party has the burden of proof, but cannot submit specific evidentiary material proving the negative.” *Gumz v. NSP Co.*, 2006 WI App 165, ¶30, 721 N.W.2d 515. In that case, if sufficient time for discovery has passed, the nonmoving party may not simply rest on the allegations in its pleadings. Rather, the nonmoving party must “make a showing sufficient to establish the existence of” the element. *Id.* (citation omitted).

¶12 Here, to disprove Weigand’s adverse possession claim, the Grefsheims were required to prove a negative. The Grefsheims submitted affidavits noting that the surveyed boundary was marked by stakes, a line of trees, and a fence line, and that no use by anyone other than themselves was apparent. However, there was no specific evidentiary material proving that Weigand had never adversely possessed the land available to them.

¶13 Once the Grefsheims pointed out the lack of evidence that any adverse possession had occurred, the burden then shifted to Weigand to “make a showing sufficient to establish” the elements of adverse possession. *Id.* When Weigand failed to put in any timely affidavits or other support for his position, he failed to meet that burden, and summary judgment was appropriate.

¶14 Weigand argues the court erred in denying his motion for an enlargement of time for submitting affidavits. As noted above, Weigand’s complaint failed to state any recognizable claim for adverse possession, so summary judgment was appropriate regardless of the presence of any affidavits.

However, even if Weigand's complaint had stated a claim, the court properly refused to enlarge the time for Weigand to submit affidavits.

¶15 A circuit court's decision to grant or deny a motion for enlargement of time is a discretionary one. *Hedtcke*, 109 Wis. 2d at 467. In exercising its discretion, the court is to determine whether the deadline was missed due to excusable neglect.⁵ See WIS. STAT. § 801.15(2)(a). The court is also to consider the interests of justice, including the opposing party's need for prompt adjudication of the matter. See *Hedtcke*, 109 Wis. 2d at 469.

¶16 If the circuit court erroneously exercises its discretion in denying a motion to enlarge time, we may independently review the record to determine whether it supports the circuit court's ultimate decision. See *Phelps v. Physicians Ins. Co.*, 2005 WI 85, ¶33, 282 Wis. 2d 69, 698 N.W.2d 643.

¶17 The burden of establishing excusable neglect is on the party moving to enlarge the time for filing. *Split Rock Hardwoods, Inc. v. Lumber Liquidators, Inc.*, 2002 WI 66, ¶50, 253 Wis. 2d 238, 646 N.W.2d 19. The party moving to enlarge time must provide "specific incidents and a persuasive explanation which justify the attorney's neglect during the entire period of his or her inattention." *Hedtcke*, 109 Wis. 2d at 473.

¶18 Here, the circuit court did not make any finding on excusable neglect or consider whether justice would be served by an enlargement of time. We

⁵ Here, excusable neglect, rather than simple cause, is the correct standard because Weigand's motion to enlarge time was filed after the April 10 deadline for filing his response. See WIS. STAT. §§ 801.15(1)(b) and 802.08(2); *Split Rock Hardwoods, Inc. v. Lumber Liquidators, Inc.*, 2002 WI 66, ¶50, 253 Wis. 2d 238, 646 N.W.2d 19.

therefore independently review the record for facts that support its decision to deny the motion. *See id.*

¶19 In his affidavit supporting his motion to extend time, Weigand's counsel asserts he did not meet the deadline because of unspecified "scheduling difficulties and a trial schedule as well as a loss of personnel in my office." From the affidavit, it is unclear what personnel change occurred, when it occurred, or how any change made it impossible to meet the deadline. Similarly, the affidavit does not mention any specific trials or how many days of trial occurred during the almost three weeks counsel had to file a timely response. These allegations do not satisfy the requirement that counsel provide "specific incidents and a persuasive explanation" justifying his neglect. *Hedtcke*, 109 Wis. 2d at 473. Weigand therefore failed to meet his burden on this issue.

¶20 The record also shows the interests of justice were served by denying Weigand's motion. The Grefsheims' affidavits indicated a delay might result in a loss of the impending sale of the land. In addition, in the four months between filing his suit and the motion hearing, Weigand failed to hire a surveyor or give direct responses to interrogatories about the nature of the land he was claiming.

¶21 Weigand asserts he is entitled to an evidentiary hearing to determine whether the missed deadline is due to excusable neglect. He cites no authority for that proposition, and we see no reason why Weigand should be granted an evidentiary hearing to provide information that should have been included in his affidavit. Further, it is common for the court to determine excusable neglect from affidavits. *See, e.g., Hedtcke*, 109 Wis. 2d at 473; *Connor v. Connor*, 2001 WI 49, ¶20, 243 Wis. 2d 279, 627 N.W.2d 182.

By the Court.—Judgment affirmed. Motion for frivolous appeal costs denied.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.